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SUPREME COURT, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

DANIEL COLON, JR.,
-Petitioner,

vs.

APEX MARINE CORP. C/O WESTCHESTER SHIPPING CO., INC. AND WESTCHESTER MARINE, INC., AND WESTCHESTER MARINE SHIPPING CO., INC., AND VERTIGO, INC., D/B/A TILLIES KING SHIPPING CO.
-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

Whether, under the Jones Act, a ship's officer acts in the course of his employment while intervening in a dispute between two fellow crewmen while on shore leave?

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No. .

IN THE

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OCTOBER TERM 1994

DANIEL COLON, JR.,
-Petitioner,

vs.

APEX MARINE CORP. C/O WESTCHESTER SHIPPING CO., INC. AND WESTCHESTER MARINE, INC., AND WESTCHESTER MARINE SHIPPING CO., INC., AND VERTIGO, INC., D/B/A TILLIES KING SHIPPING CO.
-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Daniel Colon, Jr., respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit which held that a ship's officer is not "in the course of his employment " under the Jones Act when he intervenes to stop a brawl between two crew mates while on shore leave.

OPINIONS BELOW

The Opinion of the First Circuit Court of Appeals appears in Appendix 2a. The unpublished written Opinion of the United States District Court of Rhode Island is reported as *Colon v. Apex Marine Corp., 832 F. Supp. 508 (D.R.I. 1993)*, and appears in Appendix 5a to this petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on September 15, 1994. On September 21, 1994 Judgment was entered affirming the District Court's Judgment against the Petitioner set forth in Appendix 5a. This Court's jurisdiction is invoked under Article III, section 2 of the United States Constitution.

STATEMENT OF THE CASE

The United States Court of Appeals for the First Circuit exercised jurisdiction pursuant to *28 U.S.C. 1333* and the Jones Act, *46 U.S.C. 688*. On September 20, 1993 the United States District Court for the District of Rhode Island granted the Respondents, Apex Marine Corp., summary judgment on the basis that Petitioner, Daniel J. Colon did not act in the course of his employment as a matter of law at the time he sustained injury.

On April 14, 1994 the case was closed. Petitioner filed a notice of appeal on April 28, 1994. On September 21, 1994 the United States Court of Appeals for the First Circuit entered judgment affirming the District Court's judgment against the Petitioner.

Petitioner's brief to the United States Court of Appeals for the First Circuit advised that the Petitioner, while on shore leave, as an assistant engineer aboard the S/T Charleston, intervened and sustained injuries in an altercation between crew members pursuant to an implied obligation as an officer of the vessel. The First Circuit relied upon the District Court's Opinion.

On December 23, 1987, the Petitioner was an assistant engineering officer employed by Apex Marine Corp. aboard the S/T Charleston, (hereinafter the "vessel") which was docked in Providence, Rhode Island. Providence was not the ship's home port. Petitioner, along with other crew members were allowed shore leave. While on shore leave, Petitioner visited an establishment commonly referred to as the Foxy Lady where he, by happenstance, met three (3) non-officer crew members of the vessel including Victor DeJesus (herein after "DeJesus") and Michael McCarthy (hereinafter "McCarthy").

Thereafter, the Petitioner, McCarthy, and DeJesus shared a cab to other establishments. Ultimately, they ended up at the Tillies King Cocktail Lounge (hereinafter "Tillie's King"). At approximately 10:30 p.m., while at the Tillies King, an altercation broke out between DeJesus and McCarthy. Pursuant to his obligation as a ship's officer, and in an effort to stop the fight, Petitioner put out his hands in a gesture of peace and told DeJesus to calm down. (R. App. 6a). DeJesus then pulled out a knife and stabbed the Petitioner in the side, lacerating his spleen.

Prior to the December 23, 1987 incident, on at least four different occasions, McCarthy had reported to officers of the vessel that DeJesus had threatened his life with a knife. Respondent, Apex Marine Corp., failed to investigate the threats and failed to terminate DeJesus from the vessel.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because: There exists disparity between the First Circuit Court of Appeals' decision in this case and previous decisions of this Court and the Sixth Circuit Court of Appeals. Additionally the First Circuit Court of Appeals, through it's adoption of the Rhode Island District Court's Opinion, has created a holding which directly conflicts with public policy.

To recover under the Jones Act a Plaintiff must show that he was injured in the course of his employment. The scope of "course of employment" under the Jones Act encompasses injuries suffered while on shore leave. *Daughenbaugh v. Bethlehem Steel Corp. Great Lakes S.S. DN., 891 F.2d 1199 (6th Cir. 1989). O'Donnell v. Great Lakes Co., 318 U.S. 136, 63 S.Ct. 488, 87 L.Ed. 596 (1949)*, held that a seaman may often be sent off ship to perform duties of his employment. See also, *Warren v. United States, 340 U.S. 523, 71 S.Ct. 432, 95 L.Ed. 503 (1951)*, in which a seaman injured in a dance hall while on shore leave was held to be in the service of his ship.

Daughenbaugh held that a seaman was "properly deemed [to be] on respondents's [shipowner's] business while returning from shore leave because shore leave for the crew is beneficial and *necessary* to respondents's continued operation of the M/V Foy." *Id.* at 1206.

Nowery v. Smith, 69 F. Supp. 755 (E.D. Pa. 1946), aff'd, 161 F.2d 732 (3rd Cir. 1947) (per curium), held, "the concepts on the shipowner's business and in the 'course of his employment,' . . . comprehend identical factual situations." Id. Later, in *Braen v. Preifer Oil Transportation Co., 361 U.S. 129, 80 S.Ct. 247, 4 L.Ed.2d 191 (1959)*, this Court held that "the term 'course of employment' under the [Jones] Act . . . is the equivalent of

the 'service of the ship' formula used in maintenance and cure cases." *Id.* at 132, 133. The Court advised that maintenance and cure cases supply relevant guides to the meaning of the term "course of employment" under the [Jones] Act. *Id.*

"The general laws of admiralty, . . . [once] precluded the seaman from recovery for personal injuries caused by the negligence of the shipmaster or a member of the crew." *Daughenbaugh* 891 F.2d at 1203, quoting *The Osceola, 189 U.S. 158, 172-73, 23 S.Ct. 483, 485-86, 47 L.Ed. 760 (1903).* "The Jones Act . . . removed this obstacle to recovery by granting each seaman the right to damages for injuries resulting from the shipmaster's negligence." *Id.* "The Jones Act 'protects the seaman whether he is on land or on the water so long as he is in the course of his employment.'" *Daughenbaugh* at 1203, quoting *McDonough v. Buckeye S.S. Co., 103 F. Supp. 473, 475 (N.D.Ohio 1951), aff'd, 200 F.2d 558 (6th Cir.1952), cert. denied, 345 U.S. 926, 73 S.Ct. 785, 97 L.Ed. 1357 (1953).*

As the maintenance and cure cases recognize, seamen frequent bars and taverns while on shore leave. *Aguilar* at 731. It is unequitable for a shipowner to receive the benefit of a crew member's, let alone a ship's officer's, act/duty, brought upon by the shipowner's/shipmaster's breach of his duty of care to ensure the safety and welfare of his crew members by investigating all complaints of death threats. The facts at hand called for the Petitioner's shipmaster to investigate McCarthy's complaints of DeJesus' death threats. The shipmaster failed to investigate whether or not DeJesus' possessed violent tendencies, and the Petitioner suffered as a result. At the very least the shipowner owed a duty to warn the Plaintiff of this foreseeable attack whether on board ship or ashore.

The uncontested facts beckon this Court to clearly define "scope of employment" under the Jones Act as encompassing a ship's officer's act to prevent injury or death by diffusing a life threatening fight between two subordinate crewmen. *Braen* held that a seaman, while not on board his vessel, "was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders." 361 U.S. at 131. Here, the Petitioner acted in the interest of his employer pursuant to an implied duty to safeguard the welfare of his men.

Courts have long recognized the duty or obligation of a ship's officer to maintain the safety of the ship and its crew. *Montiero v. Paco Tankers, Inc., 93 F. Supp. 93 (D.C. Pa 1950)*, quoting *The Iroquois, 194 U.S. 240, 247, 24 S.Ct. 640, 48 L.Ed. 955 (1904)*. In the present case, The First Circuit Court of Appeals affirmed the District Court's Opinion that, the Petitioner was pursuing his own agenda for pleasure at a local bar at the time of his injury. The undisputed facts demonstrate that DeJesus had made prior threats of injury to McCarthy with a knife on approximately four occasions, and that McCarthy reported the threats to his superiors. Petitioner knew of DeJesus' violent propensities. The Petitioner's supervisor knew of DeJesus' violent propensities. Had the Petitioner ignored the threat upon a crew member, he would have violated his obligation as an officer of the crew. *Jensen v. United States 184 F.2d 73 (3rd Cir. 1050)* (ship officer permitted recovery under the Jones Act when injured while intervening in an altercation in which one crew member had drawn a knife. The court held that the ship's master and officers were under a duty to see to the safety of their crew and that it was foreseeable that the crew member would draw a knife); *Stanbrewing v. United Fruit S.S. Corp., 229 F.2d 580 (2nd*

Cir. 1956); *Gerald v. United States Lines Co., 368 F.2d 343 (2nd Cir. 1966)*.

Without justification the Opinion below made the location of the Petitioner's act determinative of whether it was made "in the scope of employment." In so doing, the Opinion below attempted to factually distinguish *Daughenbaugh* from the facts at hand. Had the Petitioner's crew-members squared off on board ship, Petitioner would have been responsible for intervening. *Jensen* 184 F.2d at 74. Again, *Daughenbaugh* found a seaman to be in the course of his employment while returning to his ship from shore leave "as required by his duties on board ship." 891 F.2d at 1206. The court stated, "even though Daughenbaugh, at the time of his death, was not performing routine tasks at the request of respondents, Daughenbaugh was 'generally answerable to [the shipmaster's] call to duty.'" *Id.*

When the altercation began, Petitioner was called to a duty to interfere. That the Opinion below held that the Petitioner pursued private interests when he was injured defies logic. He acted, not for his own benefit, but in his capacity as an officer of his ship. Had Petitioner not acted he could have found himself answering to his superiors on board the vessel. Furthermore, undisputed facts hold that the Petitioner and the combatants had not planned to meet ashore. (R. App 5a-6a). It was only after finding themselves at the same bar by happenstance that they chose to share a taxi to other bars. (R. App. 5a-6a). Petitioner had no personal ties to the combatants for which he would risk life or limb. His agenda was to fulfill his obligation to his vessel.

Kyriakos v. Goulandris Et al., 151 F.2d 132 (2nd Cir. 1945), concerned a claim under the Jones Act, resulting from an assault held to have been made upon a plaintiff

while he was in the discharge of his duty. The plaintiff was a watchman charged to keep unauthorized persons from boarding his ship. *Id.* at 138. Plaintiff's expulsion of his assailant's (Bouritis) companion gave rise to Bouritis' death threat made to the plaintiff, assault upon the plaintiff at the time of the expulsion, and subsequent second assault upon the plaintiff which took place ashore one day after the plaintiff expelled the woman. *Id.* at 134. The ship's captain was made aware of the expulsion, death threat, and first assault, but "apparently did nothing at anytime prior to the subsequent assault . . . to check Bouritis' vicious tendencies, of which he [the ship's captain] appears to have had very adequate information or to terminate Bouritis' employment with the ship." *Id.* Just as the plaintiff's superiors knew and did nothing concerning Bouritis' vicious tendencies, so did Petitioner's superiors know and do nothing about DeJesus' vicious tendencies. (R. App. 6a). Just as the mens rea for Bouritis' attack originated on board ship while he and his victim carried out their duties, so did DeJesus' mens rea form aboard the S/T Charleston while he and his fellow combatant worked along side one another. The *Kyriakos* Court reasoned, "[s]o long as the resulting assault was not too causally -remote and here it clearly was not- the libellant was injured in the course of his employment when the assault was the consequence of action taken in discharge of his duty." *Id.* at 138. Again, undisputed facts reveal that prior to Petitioner's attack, on four occasions McCarthy had reported to his superiors DeJesus' knife threats made to him while on duty. (R. App. 6a). Had Petitioner not answered his call to duty, and had McCarthy been the one knifed/attacked, the *Kyriakos* holding would have vindicated McCarthy's claim against the Respondents under the Jones Act.

"Under the Jones Act, a jury question is presented if 'employer negligence played any part at all in the employee's injury.'" *Daughenbaugh*, 891 F.2d at 1207. Clearly, a jury question exists in the Petitioner's case as to whether his employer was negligent.

Quoting *O'Donnell v. Great Lakes Co., 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596*, the *Kyriakos* court stated:

> The right of recovery in the Jones Act is given to the Seaman as such, and, . . . the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.

Id. at 138. The nature of the Petitioner's service was one of duty. The facts indicate that he did not act gratuitously. He acted in his role of ship's officer as a result of circumstances brought on by his superiors' failure to deal with DeJesus, who was a clear threat to the well being of the vessel crew.

Lastly, the District Court's analysis of the differentiation between the "course of employment" in maintenance and cure cases and in Jones Act cases is illogical. The District Court cited *In Re Atlass, 350 F.2d 592 (7th Cir. 1965) cert. denied, 382 U.S. 988, 86 S.Ct. 551, 15 L.Ed 2d. 476 (1966)*, to recognize that numerous courts had allowed Jones Act recovery for seamen injured while leaving or returning to a ship.

> Assuming that [the injured seaman] were in the course of their employment while departing from the yacht for the purpose of obtaining their meals and returning there to in the normal manner, it certainly is a far-fetched idea that they continue in such a

> course when they took to themselves the liberty of spending three near midnight hours in a Tavern consuming intoxicating liquors.

Id. at 597. The District Court further noted that *Szopko v. Kinsman Marine Transit Co., 397 N.W.2d 171 (Mich 1986), cert. denied, 483 U.S. 1007, 107 S.Ct. 3232, 97 L.Ed.2d 738 (1987)* held that an intoxicated sailor returning from shore leave was not acting in the course of employment when he slipped on the dock. Both the *Atlass* and *Szopko* Courts rejected the application of the maintenance and cure standard to plaintiffs who had been found to be negligent.

Jones Act causes of action involve employer negligence. In the Petitioner's case, the employer's negligence caused the injury. There has been no evidence advanced that the Petitioner was intoxicated at the time of his injury.

Public Policy and the furtherance of maritime commerce warrants that this Court overturn the Opinion below. The best interests of the public, crewmen, and ship employers are served by responsible ship's officers/seamen who look out for the safety of fellow crewmen while on shore leave. The Petitioner conferred a benefit on his employer. The Lower Court's ruling only encourages crew members to look the other way and to not get involved. Actions such as the Petitioner's must be encouraged and expected if ship owners wish to carry out their business successfully.

This Court should grant certiorari here to explicitly rule that where a seaman acts selflessly to prevent injury resulting from battling crew-members, he acts within the scope of his employment.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the Judgment and Opinion of the First Circuit Court of Appeals in this matter.

Dated: December 19, 1994

Respectfully Submitted,

_____

Carroll E. Ayers
Attorney for the Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1522

DANIEL COLON, JR.,
Plaintiff, Appellant,

v.

APEX MARINE CORPORATION C/O WESTCHESTER SHIPPING COMPANY, INC., and WESTCHESTER MARINE, INC. and WESTCHESTER MARINE SHIPPING COMPANY, INC. and VERTIGO, INC., d/b/a TILLIES KING SHIPPING COMPANY,
Defendant, Appellees.

ERRATA SHEET

The opinion of this Court issued on September 15, 1994, is amended as follows:

On cover sheet, replace "[Hon. Jacob Hagopian, U.S. Magistrate Judge]" with "[Hon. Ronald R. Lagueux, U.S. District Judge]".

United States Court of Appeals
For the First Circuit

No. 94-1522

DANIEL COLON, JR.,
Plaintiff, Appellant,

v.

APEX MARINE CORPORATION C/O WESTCHESTER SHIPPING COMPANY, INC., and WESTCHESTER MARINE, INC. and WESTCHESTER MARINE SHIPPING COMPANY, INC. and VERTIGO, INC., d/b/a TILLIES KING SHIPPING COMPANY,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. Jacob Hagopian, U.S. Magistrate Judge]

Before
Boudin, Circuit Judge,
Aldrich, Senior Circuit Judge,
and Young, District Judge.

Carroll E. Ayers for appellant.
Gordon Arnott with whom Gregory O'Neill, Hill, Betts & Nash, Charles N. Redihan, Jr., Thomas C. Plunkett and Kiernan, Plunkett & Redihan were on brief for appellees Apex Marine Corporation and Westchester Marine Shipping Company, Inc.

September 15, 1994

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*Of the District of Massachusetts, sitting by designation.

Per Curiam. This case presents an interesting issue concerning the reach of the "scope of employment requirement under the Jones Act, 46 U.S.C. Sec. 688, as applied to a unique set of facts. In explaining its decision to grant the defense motion for summary judgment, Colon v. Alex Marine Corp. , 832 F. Supp. 508 (D.R.I. 1993), the district court issued a decision thoroughly analyzing the precedents and the pertinent facts. Although the legal question presented is open to reasonable debate, we agree with the district court's resolution and do not think that we can improve upon the reasoning set forth in its decision. Accordingly, on the central issue we affirm on the grounds set forth in the decision of the district court.

The only remaining issue is the claim that the district court abused its discretion in refusing to allow an amendment to the complaint to assert a new cause of action based on unseaworthiness. This case relates to an incident that occurred in December 1987; the defense motion for summary judgment was filed in November 1992; and the motion to amend the complaint was filed only after the district court in September 1993 granted the motion for summary judgment. The motion gave no adequate reason to excuse this substantial delay in moving to amend. Under the circumstances, we do not think that the district court abused its discretion in denying the motion as untimely.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1522

DANIEL COLON, JR.,
Plaintiff, Appellant,

v.

APEX MARINE CORPORATION C/O WESTCHESTER SHIPPING COMPANY, INC., AND WESTCHESTER MARINE, INC. AND WESTCHESTER MARINE SHIPPING COMPANY, INC. AND VERTIGO, INC., D/B/A TILLIES KING SHIPPING COMPANY,
Defendants, Appellees.

JUDGMENT

Entered: September 21, 1994

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed in accordance with the opinion of this Court dated September 15, 1994.

By The Court
/s/ Francis P. Scigliano
Clerk.

[cc: Mressrs. Ayers, Arnott]

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE OF ISLAND

DANIEL COLON, JR.
Plaintiff
v.
APEX MARINE CORPORATION c/o Westchester SHIPPING COMPANY, INC., and WESTCHESTER MARINE, INC., and WESTCHESTER MARINE SHIPPING CO., INC. and VERTIGO, INC. d/b/a/ TILLIES RING
Defendants

C.A. No 90-632L

MEMORANDUM AND ORDER

RONALD R. LAGUEUX, Chief Judge

This matter is now before the Court on a motion filed by defendants Apex Marine Corporation c/o Westchester Shipping Company, Inc., Westchester Marine, Inc., and Westchester Marine Shipping Co., Inc. (the "Apex" defendants) for summary judgment on Count I of the complaint which alleges a claim under the Jones Act. For the reasons stated below, the motion is granted.

I. Background

This suit arises from a knifing incident on December 23, 1987, involving crew members of the S/T Charleston on authorized shore leave in Providence, Rhode Island. Plaintiff Daniel Colon was an engineer aboard the vessel, while Victor DeJesus and Michael McCarthy were able-bodied seamen. Those three members of the crew left the S/T Charleston separately during the afternoon or evening of December 23. 1987. While they had not planned to meet ashore, after finding themselves in the same bar by

happenstance they chose to share a taxi in their travels to other bars. Between 9:30 and 10:00 p.m. the sailors were in a bar known as Tillies King Cocktail Lounge, playing video games and drinking. At approximately 10:30 p.m. an altercation broke out between DeJesus and Michael, in which the bartender and plaintiff intervened to restrain the two men. When the combatants were released, DeJesus again attacked McCarthy, who retreated behind plaintiff. The Coast Guard Hearing record outlines the subsequent events: "In an effort to bring the fight to a halt and to calm [DeJesus], Colon put out his hands in a gesture of peace and told DeJesus to calm down. At that point [DeJesus] pulled out his knife and stabbed Colon in the side. Colon fell to the floor and DeJesus pursued McCarthy about the lounge . . . ." Plaintiff's Exhibit "A" at p. 6. Plaintiff was transported to Rhode Island Hospital to undergo surgery for a laceration to his spleen.

McCarthy had reported prior threats made to him by DeJesus to officers of the S/T Charleston. On about four occasions McCarthy, assigned to work with DeJesus, had criticized DeJesus' laziness and asked him to do his share of the work. On these occasions DeJesus became verbally abusive, and threatened McCarthy with a knife.

Plaintiff filed this suit in December 1990 seeking to recover damages from the Apex defendants under the Jones Act (count I), and from Vertigo, Inc., doing business as Tillies King, under the Rhode Island Liquor Liability Act (Count II).

Plaintiff claims that because the officers aboard the ship were aware of DeJesus' behavior on prior occasions, the Apex defendants are liable for the injuries plaintiff received at Tillies King Cocktail Lounge. The Apex defendants move for summary judgment, on the grounds that there is no evidence that they were negligent, and that plaintiff was not injured in the course of his employment as required by the Jones Act. The parties engaged in oral argument on March 10, 1993, and the matter was taken under advisement. It is now in order for decision.

II. Discussion

A. Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure sets forth the standard for ruling on a summary judgment motion:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.

In determining whether summary judgment is appropriate, the court must view the facts on the record and all inferences therefrom in the light most favorable to the nonmoving party. Continental Casualty Co. v. Canadian Universal Ins. Co., 924 F.2d 370, 373 (lst Cir. 1991). Additionally, the moving party bears the burden of showing that no evidence supports the non moving party's position. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 254a, 2554, 91 L. Ed. 2d 265 (l986). In order for the Apex defendants to prevail on their motion, they must show that no

genuine issue of material fact exists to support plaintiff's case. The motion can then be granted if, as a matter of law, defendants are entitled to judgment in their favor.

B. The Jones Act

The Jones Act provides, in relevant part, that "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . ," 46 U.S.C.. Sec. 688.

Prior to 1920, when Congress passed the Jones Act, an injured seaman was entitled to receive wages and expenses of maintenance and cure, essentially financial support for as long as necessary to effect the highest degree of recovery possible, but could not recover damages for personal injury caused by negligence of the shipowner or captain. See The Osceola, 189 U.S. 158, 172-73, 23 S. Ct. 483, 485-86, 47 L. Ed. 760 (1903). The Jones Act granted seamen injured in the course as their employment because as ship owner negligence the right to recover damages. See Merchant Marine Act of 1920, ch. 250, Sec. 33, 41 Stat. 988, 1007 (codified at 46 U.S.C.. Sec. 688). In this case, plaintiff claims that the Apex defendants may be held liable in negligence for the attack, on shore in a bar, by his fellow crew member DeJesus.

Two issues are raised by the motion for summary judgment: whether the Apex defendants were negligent in retaining DeJesus as a seaman aboard the S/T Charleston after notice of his violent propensities, and whether plaintiff was injured in the course of

employment" as required for recovery under the Jones Act.

1. Negligence

The Apex defendants argue that they can not be found negligent because they did not know of any dangerous propensities on the part of DeJesus, and they did not have control over the premises where plaintiff was injured.

Plaintiff counters that because McCarthy had reported the prior incidents with DeJesus, the Apex defendants had, or should have had, knowledge of DeJesus' "violent propensity." Possession of that knowledge made harm caused by DeJesus foreseeable, and triggered a duty to protect the crew. Plaintiff argues that this duty to protect the crew makes the Apex defendants liable even for an injury in a bar during shore leave.

Under general maritime law recovery for an assault of this type (one crew member on another) is possible under theories of either unseaworthiness or ship owner negligence. See Benedict on Admiralty, Sec. 31 et seq. The unseaworthiness approach involves a showing that the assailant was a sufficient danger to the crew to violate the ship owner's absolute duty to maintain a seaworthy vessel. Id.; Kratzer v. Capital Marine Supply. Inc., 490 F. Supp. 222, 229 (M.D. La. 1980), aff'd 645 F.2d 477 (5th Cir. 1981) (citing Mitchell v. Trawler Racer. Inc., 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960)). That theory has not been argued before this Court.

The theory of shipowner negligence, on the other hand, requires plaintiff to establish one of the following: "1) that

the assault was committed by the plaintiff's superior for the benefit of the ship's business; 2) that the master or ship's officers failed to prevent the assault when it was foreseeable." Benedict on Admiralty, at 3-242. See Wiradihardja v. Bermuda Star line. Inc., 802 F. Supp. 989, 993 (S.D.N.Y. 1992). Plaintiff was not assaulted by a superior, foreclosing that branch of negligence recovery.

Under a foresee ability of harm theory, liability is established by showing that the ship owner breached its duty of providing for the crew's reasonable safety. Such liability can arise when "(1) the assailant is a person of known vicious character, and (2) the ship owner knew or should have known of the crew member's violent propensities." Wiradihardja, 802 F. Supp. at 993 (citations omitted). See also Koehler v. Presque-Isle Transp. Co., 141 F.2d 490, 491 (2nd Cir.), cert.denied, 322 U.S. 764, 64 S. Ct. 1288, 88 L. Ed. 1591 (1944) (ship owner liable for damages where "the ship's officers knew, or with ordinary diligence, should have known" of the assailant-employee's character).

The Apex defendants argue that there is no showing that they had sufficient knowledge regarding DeJesus to foresee a danger posed to plaintiff or other crew members. A ship owner can not be, found liable for an assault injury where there is no evidence the assailant was a habitual violator of ship discipline or had "engaged in any fights or controversies . . . or that he had ever threatened anyone with a knife or other weapon prior to [the

the assault was committed by the plaintiff's superior for the benefit of the ship's business; 2) that the master or ship's officers failed to prevent the assault when it was foreseeable." Benedict on Admiralty, at 3-242. See Wiradihardja v. Bermuda Star line. Inc., 802 F. Supp. 989, 993 (S.D.N.Y. 1992). Plaintiff was not assaulted by a superior, foreclosing that branch of negligence recovery.

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assault]." Connolly v. Farrell Lines. Inc., 268 F.2d 653, 655 (lst Cir.), cert. denied, 361 U.S. 902, 80 S. Ct. 208, 4 L. Ed. 2d 158 (1959). In Connolly, the Court held that one assault, without prior threats or violence, was insufficient to establish negligence by the employer. Additionally, in Connolly there was insufficient evidence to find that the assailant possessed "a savage disposition" or "a vicious nature." Id. at 656.

However, in this case plaintiff has presented evidence that previous incidents of violent behavior by DeJesus were reported to superior officers. Whether those reports gave plaintiff's employer sufficient knowledge to foresee a danger to the crew is a question of fact for the jury. Therefore, the motion for summary judgment cannot be granted on this basis.

2. Course of Employment

To recover under the Jones Act, plaintiff must show that he was injured while in the course as his employment. The Apex defendants argue that plaintiff, while away from the ship for his own purposes, was not in the performance of his duties when injured, and thus he was not in the-course of his employment.

Plaintiff argues that the scope of "course of employment" under the Jones Act is an expansive one that encompasses injuries suffered on shore leave. Plaintiff relies on Daughenbaugh v. Bethlehem Steel Corp., Great Lakes S.S. Div., 891 F.2d 1199 (6th Cir. 1989), in which plaintiff's decedent was a seaman who was returning to the ship from shore leave when he disappeared. His body was found three weeks later floating in the water near the

dock. The sixth Circuit upheld the District Court's determination that Daughenbaugh was acting in the course of employment when he disappeared. The Court stated, "because Daughenbaugh was required to return to the ship before the appointed sailing time, he was acting in the course of his employment when, en route to [his ship], he disappeared on the dock." Id. at 1206. The Court also noted that Daughenbaugh disappeared while using the route customarily taken by the crew when returning to the ship. Id. at 1207.

Dauqhenbauqh is factually distinguishable from the instant case, because Daughenbaugh was returning to the ship, as required by his duties on board ship, at the time of his death. Plaintiff, on the other hand, was pursuing his own agenda for pleasure at a local bar at the time of his injury. Plaintiff, however, argues that the reasoning used by the Sixth Circuit, applying the standard used under maintenance and cure to Jones Act "course of employment," indicates that plaintiff was acting in the course of employment while in a bar on shore leave.

It is well established that a seaman injured while on shore, leave is entitled to maintenance and cure from his employer. In Aquilar v. Standard Oil Co., 318 U.S. 724, 63 S. Ct. 930, 84 L. Ed. 1107 (1943), the United States Supreme Court held that an employer's responsibility for maintenance and cure for a seaman injured in the service of the ship "extends beyond injuries sustained because of, or while engaged in, activities required by his employment." Id. at 732. The Court reasoned

> To relieve the ship owner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are "exclusively personal" and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. . . . In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion.

Id. at 733-34. The court held that Aguilar, who was injured while traveling on the only route between the ship and a public street as he left the vessel for shore leave, was entitled to maintenance and cure. Eight years later, the court relied on Aguila in holding that a seaman injured in a dance hall while on shore leave was entitled to maintenance and cure. Warren v. United States, 340 U.S. 523, 71 S. Ct. 432, 95 L. Ed. 503 (1951).

Although both Aguilar and Warren involved recovery for maintenance and cure, the Court in Daughenbaugh relied on those cases in its determination of the scope of recovery under the Jones Act. The Court relied on language used by the Supreme Court in Braen v. Pfeifer Oil Transp. Co., 361 U.S. 129, 132-33, 80 S. Ct. 247, 250, 4 L. Ed. 2d 191 (1959), indicating that course of employment under the Jones Act is equivalent to the

maintenance and cure requirement that a seaman be in service of the ship.

In Braen, the plaintiff was injured on a catwalk between his vessel and a work barge, while preparing to perform some

carpentry work on a raft as ordered by his superior. The Supreme Court reversed the Court of Appeals' denial of recovery under the Jones Act, which apparently was based on the theory that the plaintiff was not a seaman at the time he was injured because the work he was doing was not in furtherance of the navigation of the vessel. 361 U.S. at 131. The Supreme court held that even though plaintiff was not on board the vessel, he "was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders." Id. at 133. In its analysis, the Supreme Court cited both Aguilar and Warren in support of the proposition that the fact that the injury did not occur on the vessel was not controlling. Braen at 132. The Court stated:

> These two cases were not brought under the Jones Act but involved maintenance and cure. Yet they make clear that the scope of a seaman's employment or the activities which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships. They also supply relevant guides to the meaning of the term 'course of employment' under the Act since it is the equivalent of the 'service of the ship' formula used in maintenance and cure cases.

Id. at 132-33.

Although not cited by plaintiff, one case applies the same reasoning as Daughenbaugh to sustain Jones Act recovery in circumstances very similar to the case at hand. In Nowery v. Smith, 69 F. Supp. 755 (E.D. Pa. 1946), aff'd, 161 F.2d 732 (3rd Cir. 1947) (per curiam), plaintiff Nowery was injured in a fist fight with the chief engineer of

his vessel while he was on shore leave in a barroom at Antilla, Cuba. The District court held

that plaintiff was both "on the ship owner's business" for maintenance and cure purposes and "in the course of his employment" under the Jones Act when he was injured.1 The Court noted that Aguilar involved a different factual situation, but stated:

> it seems to me that it was the occasion for the seaman's absence from the vessel - shore leave - which determined that he was on "the shipowner's business" while he was on premises which had to be traversed in going from or returning to the vessel. That being so, I think that logic compels the conclusion that the seaman should also be considered on "the ship owner's business" while he is actually enjoying his shore leave. And if, for the purpose of determining the ship owner's liability for maintenance and cure, the seaman is said to be on "the ship owner's business" while on shore leave, I can see no valid reason why, for the purpose of determining the ship owner's liability under the Jones Act, the seaman should not be said to be "in the course of his employment" at the same time. It is simply a question of defining the seaman's status: and I think that the concepts "on the ship owner's business," and "In the course of employment," as they are applied to the seafaring trade, comprehend identical factual situations.

Id. at 757 (footnote omitted).

This Court believes that the Daughenbaugh and Nowery courts' reliance on the dicta in Braen is misplaced. Braen actually held that the plaintiff "was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer

pursuant to his employer's orders." 361 U.S. at 133. In contrast, the Supreme Court has defined the requirement for maintenance and cure much more broadly, stating

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1 The Court granted the motion for a new trial on the Jones Act claim because, while there was sufficient evidence to go to the jury on the foreseeability theory, there was no legal basis for the alternate theory presented to the jury, that plaintiff could recover if he was acting "as an officer of the ship." 69 F. Supp. at 758.

that for maintenance and cure a seaman must "at the time be 'in the service of the ship,' by which is meant that he must be generally answerable to its call to duty rather than actually in performance of routine tasks or specific orders." Farrell v. United States, 336 U.S. 511, 516, 69 S. Ct. 707, 709, 93 L. Ed. 850 (1949). The Farrell case is instructive because it contrasts the rights of seamen under the two theories:

> In Aguilar v. Standard Oil Co., 318 U.S. 724, the Court pointed out that logically and historically the duty of maintenance and cure derives from a seaman's dependence on his ship, not from his individual deserts and arises from his disability, not from anyone's fault. We there refused to look to the personal nature of the seaman's activity at the moment of injury to determine his right to award. Aside from gross misconduct or insubordination, what the seaman is doing and why and how he sustains injury does not affect his, right to maintenance and cure, however decisive it may be as to claims for indemnity or for damages for negligence.

Id. at 515-16 (emphasis added).

This Court is not the first to hold that Jones Act course of employment is more limited than the scope of maintenance and cure. In In re Atlass, 350 F.2d 592 (7th Cir. 1965), cert. denied, 382 U.S. 988, 86 S. Ct. 551, 15 L. Ed. 2d 476 (1966), the Seventh Circuit contrasted the scope of recovery under these two actions in holding that the employer was entitled to exoneration from liability because, inter alia, its seamen were not acting in the course of employment when they returned to the vessel heavily intoxicated. The Court recognized that numerous courts

had allowed Jones Act recovery for seamen injured while leaving or returning to a ship, but stated:

> Assuming that [the injured seamen] were in the course of their employment while departing from the yacht for the

> purpose of obtaining their meals and returning thereto in the normal manner, it certainly is a far-fetched idea that they continued in such course when they took to themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors.

350 F.2d at 597. Similarly, in Szopko v. Kinsman Marine Transit Co., 397 N.W.2d 171 (Mich. 1986), cert. denied, 483 U.S. 1007, 107 S. Ct. 3232, 97 L. Ed. 2d 738 (1987), the Michigan Supreme Court held that an intoxicated sailor returning from shore leave was not acting in the course of employment when he slipped on the dock. The Court rejected application of a maintenance and cure standard, aptly stating, "We cannot ignore the phrase 'in the course of his employment,' because it was intended to mean what it says." Id. at 175.

It is appropriate that maintenance and cure be afforded an expansive scope, covering all injuries incurred during the term of a seaman's employment. Maintenance and cure is a very different remedy from that of the Jones Act. It gives Shipowners "broad responsibilities for [the] health and safety" of seamen, necessitated by an occupation involving not only significant hazards, but also "constant shuttling between unfamiliar ports." Aguilar, 318 U.S. at 721. As Justice Story wrote in an early American commentary on maintenance and cure:

> [if] some provision be not made for [seamen] in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. . . . On the other hand, if these expenses [the expenses occasioned by

perilous diseases] are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will never be tempted to abandon the sick to their forlorn fate.

Harden v. Gordon, 2 Mason 541, 11 F. Cas. 480, 483 (C.C.D. Me. 1823).

Furthermore, the Supreme Court has expressed a policy of making the maintenance and cure remedy as simple as possible.

> It has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigations. . . . [T]he master knew he must maintain and care for even the erring and careless seaman, much as a parent would a child. For any purpose to introduce a graduation of rights and duties based on some relative proximity of the activity at time of injury to the employment" or the "service of the ship," would alter the basis and be out of harmony with the spirit and function of the doctrine and would open the door to the litigiousness which has made the land man's remedy so often a promise to the ear to be broken to the hope.

Farrell, 336 U.S. at 516. Such concerns do not apply to the Jones Act, which is not intended to be a form of insurance for an ill seaman, and necessarily involves sometimes complicated issues of fault.

Lastly, this case is distinguishable from the many cases holding that a seaman returning from shore leave via a customary route is acting in the course of his employment, because in those cases the injury is related to the seaman's duty to return to the ship at a particular time. See

Daughenbaugh, 891 F.2d at 1206 ("Thus, because Daughenbaugh was required to return to the ship before the appointed sailing time, he was acting in the course of his employment when, en route to the M/V Foy, he disappeared on the dock."); Marceau v. Great Lakes Transit Corp.., 146 F.2d 416, 418 (2d Cir.), cert. denied, 324 U.S. 872, 65 S. Ct. 1018, 89 L. Ed. 1426 (1945) ("The plaintiff was acting under orders when he

returned to the ship."). Plaintiff here was pursuing his own private interests when he was injured. He was in the company of his fellow crew members by his own choice in that cocktail lounge. When plaintiff intervened in the dispute between DeJesus and McCarthy, he was not performing a duty that was assigned to him either explicitly or implicitly as an engineer on the S/T Charleston. He had no obligation of any kind to the vessel, its officers or owners to get involved in that altercation. Therefore, on the undisputed facts in this case, plaintiff was not acting "in the course of his employment" as a matter of law at the time of his injury.

III. Conclusion

For the reasons stated above, the Apex defendants' motion for summary judgment on Count I is hereby granted. No judgment shall enter until all issues in this case are resolved. It is so ordered.

/s/

Ronald R. Lagueux
Chief Judge
September 20 , 1993

(2)

No. 94-1322

Supreme Court, U.S.
FILED
FEB 23 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DANIEL COLON, JR.,

Petitioner,

—v.—

APEX MARINE CORP. c/o WESTCHESTER SHIPPING CO., INC. and WESTCHESTER MARINE, INC., and WESTCHESTER MARINE SHIPPING CO., INC., and VERTIGO, INC., d/b/a TILLIES KING SHIPPING CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Did the Court of Appeals commit error when it affirmed the district court's decision that under a unique set of facts a seaman on shore leave was not, as a matter of law, in the course of his employment pursuant to the Jones Act when he was injured?

STATEMENT REQUIRED BY RULE 29.1

Apex Resources, Inc. is the corporate parent of respondent Apex Marine Corporation, who is the corporate parent of respondent Westchester Marine Shipping Co., Inc. Neither corporation has any other non-wholly owned subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1322

DAVID COLON , JR.

Petitioner,

—against—

APEX MARINE CORP. C/O WESTCHESTER SHIPPING CO., INC. and WESTCHESTER MARINE, INC. and WESTCHESTER MARINE SHIPPING CO., INC., AND VERTICGO, INC., d/b/a TILLIES KING SHIPPING CO.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Respondents Apex Marine Corporation and Westchester Marine Shipping Co., Inc. respectfully pray that this Court deny the Petition for Writ of Certiorari. The question raised by petitioner is not presented by the decision below. That decision rests on the application of existing principles to a unique factual situation. The First Circuit's affirmance of the district court's decision made no novel legal principle and its

affirmance created no conflict or lack of uniformity among the circuits. There is nothing in the decision below which merits, much less requires, plenary review by this Court.

STATEMENT OF THE CASE

The facts as presented to the district court are not in dispute. On appeal to the First Circuit, petitioner cited to the district court's statement of facts without claim of any error. The undisputed facts are that S/T CHARLESTON was a United States flag vessel managed by respondent Apex Marine Corp. At the time of the incident the vessel was docked at the United States port Providence, Rhode Island. Petitioner was an engineer in the engine department while Mr. McCarthy and Mr. DeJesus were able bodied seamen in the deck department. (5a)[1]

During the afternoon or evening of December 23, 1987 petitioner left the vessel on authorized shore leave and went to a bar where he met other crew members, two of whom were Mr. McCarthy and Mr. DeJesus. (5a) After a period of time petitioner and the other crew members shared a taxicab to other bars. (6a) Between 9:30 and 10:00 p.m. petitioner, Mr. McCarthy and Mr. DeJesus were in a bar known as Tillies King Cocktail Lounge, where they were playing video games and drinking. (6a) At approximately 10:30 p.m. an altercation broke out between Mr. McCarthy and Mr. DeJesus. (6a) The bartender asked petitioner to help break up the fight. In response, petitioner assisted the bartender with each restraining one of the two men. When the combatants were released, Mr. DeJesus again attacked Mr. McCarthy who retreated behind petitioner. (6a) Before the situation calmed, petitioner had been stabbed by Mr. DeJesus, who had attempted to stab Mr. McCarthy. Whether or not Mr. DeJesus had exhibited violent behavior in the past and whether respondent knew of any

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[1] Cites to the appendix of the Petition for Writ of Certiorari are cited by a page number followed by the letter "a".

such violent behavior were disputed facts at the district court level which were resolved in petitioner's favor but were irrelevant to that part of the decision which granted respondents summary judgment. Petitioner had testified in the district court action by deposition. When questioned as to his reason for intervention in the fight, petitioner failed to testify as to any duty regarding the crew members' safety. On appeal to the First Circuit, petitioner argued for the first time that as an officer he had intervened pursuant to a duty regarding the safety of crew members on shore leave.

ARGUMENT

I. THERE IS NO PUBLIC POLICY ISSUE TO BE ADVANCED BY REVIEW OF THE DECISION BELOW

Certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties" and where "there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal" *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

The question presented by petitioner is not supported by the facts. To review the decision of the Court of Appeals would require the Supreme Court to assume disputed facts which were not presented to the trial court, nor received by the First Circuit and which are contrary to the facts which were introduced into evidence. This case involves no issue of public policy, but involved the application of existing law to a unique set of undisputed facts. (3a) While petitioner's counsel avers in the petition that petitioner had a duty to intervene in the altercation because of safety responsibilities charged to him as an officer, petitioner did not, in the courts below, submit evidence that petitioner acted because of such an alleged

duty. On appeal petitioner did not allege that the district court erred by omitting a relevant issue of fact regarding petitioner's reason for intervening. To the contrary, in his brief to the First Circuit, petitioner cited to the district court's recitation of the facts. His argument to the First Circuit had no factual basis but was lost by the facts as they were presented to the district court. The district court found as a matter of law, based upon the undisputed facts presented to it, that petitioner was on shore leave and did not intervene in the altercation pursuant to an express or implied duty to act. Contrary to his position taken in the writ, petitioner has never presented evidence that he acted because he had a duty to insure the safety of the other crew members.[2] The courts below therefore did not decide the question which petitioner now seeks to have reviewed. There is no public policy regarding safety to be advanced by this Court reviewing the question presented by petitioner because the facts do not show petitioner acted for safety reasons. Therefore, even if this Court were to rule that petitioner had a duty to intervene, it would not call for reversal or remand because there is no fact in evidence before the court to find that petitioner's reason for intervention in the altercation was based explicitly or implicitly on a duty to act for the safety of a crew member. Further, contrary to petitioner's assertion, extension of the Jones Act to the factual situation involved in this matter would not serve to encourage

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[2] Petitioner's argument that he was in the course of his employment because he was responsible for the safety of the two seamen in the deck department while they were in a bar in Providence, Rhode Island is the third reason petitioner has advanced for his actions. In a supplemental brief filed in the district court after oral argument petitioner cited to *Nowery v. Smith*, 69 F.Supp. 755 (E.D. Pa. 1946), aff'd, 161 F.2d 732 (3rd Cir. 1947) (per curium) and *Daughenbaugh v. Bethlehem Steel Corp., Great Lakes S.S. Div.*, 891 F.2d 1199 (6th Cir. 1989) for the proposition he did not have to be in the course of his employment to recover under the Jones Act. In his motion for reconsideration filed in the district court, petitioner argued that he intervened because he was concerned that the vessel might sail short handed. On appeal petitioner cited no facts to provide a basis for his argument that he acted due to a safety duty imposed upon him while recreating ashore.

a seaman to voluntarily intervene in altercations as did petitioner. If the Jones Act were extended such that petitioner was held to be in the course of his employment in the bar, petitioner would not have been acting voluntarily but would have been required to step into the fray, thus placing himself in danger. No public policy is advanced by requiring a seaman to place himself in danger.

Petitioner's public policy arguments are baseless. He is merely dissatisfied with the result below as it effects him personally. This Court has stressed that it does not "sit for the benefit of the particular litigants." *Rice*, 349 U.S. at 74.

II. THE DECISION BELOW IS NOT IN DISPARITY WITH THIS COURT OR WITH THE SIXTH CIRCUIT COURT OF APPEALS

Petitioner incorrectly asserts that the decision below is in conflict with a prior opinion of the Sixth Circuit. In *Daughenbaugh v. Bethlehem Steel Corp., Great Lakes S.S. Div.*, 891 F.2d 1199 (6th Cir. 1989) the plaintiff's decedent was a seaman who was returning to his ship from shore leave when he disappeared. His body was found three weeks later floating in the water near the dock where he had been last seen. The Sixth Circuit upheld the decision of the district court that *Daughenbaugh* was acting in the course of his employment when he disappeared. Citing several lower court cases and its own precedents, the Sixth Circuit stated "numerous lower courts have held that when a seaman is traveling along a standard route to leave the ship and go ashore or to return to the ship from shore leave, the seaman is acting within the course of his employment under the Jones Act." *Daughenbaugh* at 1206 (citations omitted). The court continued "we have concluded that the district court did not err in finding that '*Daughenbaugh* was in the scope of his employment when last seen by the ship's officers.' Opinion at 3." *Id.* The *Daughenbaugh* court noted that because plaintiff was required to return to the ship before its appointed sailing time he was acting in the course of his employment when he disappeared

while "en route" to the ship, *id*, along the "route customarily taken" by the crew. *Id.* at 1207. In contrast here, on uncontested facts, the district court found:

> Plaintiff here was pursuing his own private interests when he was injured. He was in the company of his fellow crew members by his own choice in that cocktail lounge. When plaintiff intervened in the dispute between DeJesus and McCarthy, he was not performing a duty that was assigned to him either explicitly or implicitly as an engineer of the S/T CHARLESTON. He had no obligation of any kind to the vessel, its officers or owners to get involved in that altercation. Therefore, on the undisputed facts of the case, plaintiff was not acting "in the course of his employment" as a matter of law at the time of his injury.

Colon v. Apex Marine Corporation, 832 Supp. 508 (D.R.I. 1993), 19a. Here plaintiff was on shore leave and was not returning to the vessel. The district court did not hold that a seaman could never be in the course of his employment while on shore but merely held petitioner was not performing any duty when petitioner intervened while on shore leave. In contrast, *Daughenbaugh* did not hold that a seaman is always in the course of his employment while on shore leave, or that a seaman has a duty to intervene in an altercation between other seamen. The Sixth Circuit in *Daughenbaugh* only held that the district court did not err when it found a seaman returning to a vessel under its particular circumstances to be in the course of employment. There is no embarrassing conflict between the circuits.

Petitioner's cite to *Nowery v. Smith*, 69 F. Supp. 755 (E.D. Pa. 1946), *aff'd*, 161 F.2d 732 (3rd Cir. 1947) (per curiam) similarly does not indicate a conflict in the circuits. There, the district court held, *inter alia* that the term "course of employment", in regard to the seafaring trade, simply defines an individual's status as a seaman and therefore it held the term to be identical to the term "service of the vessel" when

used in the context of maintenance and cure. *Id.* at 757.[3] However, the Third Circuit in *Nowery* did not affirm the above part of the district court's holding. The sole issue on appeal in *Nowery* was whether a seaman injured during a fight in a barroom while on shore leave in a foreign port was entitled to maintenance and cure. *Nowery v. Smith*, 161 F.2d 732 (3rd Cir. 1947). There is no conflict with the Third Circuit.

The First Circuit's affirmance is not in disparity with any decision of the Supreme Court. In *Braen v. Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129 (1959), this Court held that a seaman was "acting in the 'course of employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders." *Id.* at 133. This Court cited with approval *Marceau v. Great Lakes Transit Corporation*, 146 F.2d 416 (2nd Cir. 1945) which held that a ship's cook was allowed to recover under the Jones Act because his injury occurred when *pursuant to duty* he was returning from shore, and also cited *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1942) where the plaintiff was injured when performing a task ashore pursuant to order. *Braen* at 132. When citing to *O'Donnell*, this Court stated in *Braen* "[a] 'seaman' may often be sent off ship to perform duties of his employment." *Braen* at 132. This court did not hold that a seaman is always in the course if his employment while ashore. Nothing in the decision of the district court or in the First Circuit's affirmance suggests that an engineer can never have duties related to safety while on shore or that a seaman performing the work of his employer while ashore cannot recover under the Jones Act. The district court merely held that petitioner was not performing a duty that was assigned either explicitly or implicitly as an engineer aboard

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[3] The district court's holding that the term "course of employment" only defines an individual's status as a seaman is not valid in view of *Braen v. Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 132 (1959) where, starting with the premise an employee was a seaman, this Court then went on to decide whether the seaman was injured in the course of his employment. *Braen* at 131-132.

the S/T CHARLESTON at the time he intervened. *Colon v. Apex Marine Corporation*, 832 F. Supp. 508 (D.R.I. 1993), 19a. The First Circuit merely held that the case involved a unique set of facts and "[a]lthough the legal question presented is open to reasonable debate, we agree with the district court's resolution . . ." (3a) The decision is in conformity with the prior decisions of this Court.

III. THE DISTRICT COURT'S DECISION WHICH WAS AFFIRMED BY THE FIRST CIRCUIT WAS SIMPLY THE APPLICATION OF EXISTING LAW TO A UNIQUE SET OF FACTS

The district court's decision breaks no new ground which is worthy of this Court's review. This Court held in *Braen v. Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129 (1959) that the seaman was in the course of his employment when injured because he was performing a duty required by his employment. The circuit courts that have addressed the issue of "course of employment" make it clear that more is required to be in the "course of employment" while a seaman is ashore than the mere fact he is assigned to the vessel. *See, ie., In re Atlass'*, 350 F.2d 592 (7th Cir. 1965) *cert denied, sub. nom.* 382 U.S. 988 (1966); *McClure v. United States Lines Company*, 368 F.2d 197 (4th Cir. 1966); *Trost v. American Hawaiian S.S. Co.*, 324 F.2d 225, 228 (2nd Cir. 1956), *cert. denied.*, 351 U.S. 937 (1956). In *Kryiakos v. Goulandris*, 151 F.2d 132 (2nd Cir. 1945) cited by petitioner, the seaman's injury arose out of the performance of an explicit job duty. This Court has let stand decisions that have hinged recovery for seamen injured on shore on whether or not the seaman was injured because of a duty required by his job. *See In re Atlass'*, *supra*; *Szopko v. Kinsman Marine Transit Co.*, 397 N.W. 2d 171 (Mich. 1986) *cert. denied.* 483 U.S. 1007 (1987).[4] Even

[4] Plaintiff's attempt to distinguish *In re Atlass'*, 350 F.2d 592 (7th Cir.) *cert. den., sub.nom.* 382 U.S. 988, 86 S. Ct. 551, 15 L.Ed. 2d 476 (1966) and *Szopko v. Kinsman Marine Transit Co.*, 626 Mich 563, 397 N.W. 171, (Mich 1986), *cert. den.*, 486 U.S. 1007 (1987) because in these

Daughenbaugh v. Bethlehem Steel Corp., Great Lakes S.S. Div., 891 F.2d 1199 (6th Cir. 1989), relied upon by petitioner, permitted recovery not merely because the plaintiff seaman was on shore but because the seaman was involved in an activity impliedly required by his employment.

This Court has held that recovery depends on "the nature of the service and its relationship to the operation of the vessel plying in navigable waters." *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1942)

Petitioner testified at deposition that he intervened when requested to do so by the bartender. When asked why he intervened, petitioner did not testify he did so due to an explicit or implicit safety responsibility. Not in response to the motion, or at any time did petitioner submit evidence that he acted because of an alleged safety duty. In its decision, the district court did nothing more than apply the above standard to the undisputed facts before it and held that as a matter of law, at that time of intervention, petitioner was not acting to perform a duty of his employment.

IV. EVEN IF PETITIONER WERE ACTING FOR SAFETY CONCERNS, IT DOES NOT MEAN HE WAS IN THE COURSE OF HIS EMPLOYMENT

Despite the lack of a factual basis, even if this Court were to accept that petitioner was acting for safety concerns, petitioner cites to no decision of this Court nor any circuit court which holds an engineer on shore leave in an American city where police are responsible for law and order, has a duty relating to safety to intervene in an altercation between two seamen in the deck department. To the contrary, circuit court decisions indicate a safety duty is not imposed on a seaman on shore leave merely because the safety of other crew mem-

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cases the plaintiffs were negligent, ignores the premise of the cases that the first step in the analysis is to determine if the seaman was in the course of his employment. In each, course of employment was analyzed first and without relation to negligence.

bers is involved. *See, McClure v. United States Lines Company*, 368 F.2d 197, 199 (4th Cir. 1966); *In re Atlass'*, 350 F.2d 592 (7th Cir. 1965), *Cert. denied., sub nom*, 382 U.S. 988 (1966); *Trost v. American Hawaiian S.S. Co.*, 324 F.2d 679 (2nd Cir. 1956), *cert. denied.*, 351 U.S. 937 (1956). That petitioner was an engineer raises no special duty. *McClure*, at 198.

Also, contrary to petitioner's assertion, the district court did not base its decision of whether petitioner could recover on whether petitioner was injured while on land. That a seaman's duties or lack of duty may vary by his location and activity at the time does not mean that recovery is solely based on the location of an injury. To accept petitioner's argument that location is irrelevant however would extend the alleged safety duty to the point where the employer is the insurer of the safety of a seaman at any shoreside location as long as an "officer" was present. Petitioner cites no authority from this Court, nor any circuit court, to support his argument that a seaman's location and activity is irrelevant to the determination of course of employment.

Petitioner cites to no decision of this Court which extends a master's duty, much less an engineer's duty, to the protection and safety of a seaman at all locations the seaman in the deck department may travel while on shore leave. The cases cited by petitioner are distinguishable. They all involve the duties of the master or involve a situation where an officer is charged with enforcing a shipboard policy. *Montiero v. Paco Tankers, Inc.*, 93 F. Supp. 93 (E.D.Pa. 1950) only held that the *master* of the vessel owed a duty of safe transport to a seaman leaving a vessel until he was away from the *proximity* of the vessel. *The Iroquois*, 194 U.S. 240 (1904) involved the duties of the master of a vessel. In *Jensen v. United States*, 184 F.2d 72 (3rd Cir. 1950), the incident occurred on the vessel when the officers returned to duty. Both *Stankiewicz v. United Fruit S.S. Corp.*, 229 F.2d 580 (2nd Cir. 1956) and *Gerald v. United States Lines Co.*, 368 F.2d 343 (2nd Cir. 1966) involve the duties of the master and officers in enforcing, *on board the*

ship, a company policy and a Coast Guard rule against the use and possession of alcoholic beverages on board a vessel. None involve the unique factual situation in this case where petitioner engineer is fortuitously present when a fight breaks out between two members of the deck department in a bar ashore after spending hours in other bars. None of the above cases hold that an engineer has an unremitting responsibility for the safety of every crew member at any time while on shore leave and none of the cases require much less suggest the rule petitioner now seeks.

CONCLUSION

The First Circuit's decision creates no disparity between the First Circuit and the Sixth Circuit or any other circuit, and raises no public policy issue requiring this Court's attention, but applies existing law to a unique factual situation. The writ should be denied.

Dated: New York, New York
February 23, 1995

Respectfully submitted,

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